In the

United States Court of Appeals

For the Ninth Circuit

STATE OF WASHINGTON, a Sovereign State, and SMITH TROY, Attorney General of the State of Washington, *Appellants*, v. UNITED STATES OF AMERICA, *Appellee*.	No. 12895
UNITED STATES OF AMERICA, *Appellant*, v. STATE OF WASHINGTON, a Sovereign State, and SMITH TROY, Attorney General of the State of Washington, *Appellees*.	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANTS AND CROSS-APPELLEES

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v.		
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JURISDICTION

This is a civil action by the State of Washington, pursuant to the Federal Tort Claims Act of 1946 as amended in 1949, 28 U.S.C., §§ 1346(b), and 2671, to recover money the state was required to expend as a result of the negligence of an agent of the United States of America, while acting within the scope of his authority, all as

alleged by the second amended complaint herein. (Tr. 4.)

The district court had jurisdiction by virtue of 28 U.S.C., § 1346(b).

This appeal is pursuant to Title 28 U.S.C., § 1291 from the final judgment entered by the district court on the 9th day of January, 1951. (Tr. 27.)

STATEMENT OF THE CASE

This action is based upon the Federal Tort Claims Act to recover money which the State of Washington was required to expend as a result of the negligence of an agent of the Federal government. The original complaint on this cause of action was filed on June 4, 1948. (Tr. 38.) The complaint was dismissed on January 17, 1949, pursuant to stipulation of counsel for the respective parties for the reason that the cause of action was barred by the Statute of Limitations. (Tr. 45.) On March 1, 1950, subsequent to the enactment of 63 Stat. 62, 28 U.S.C., § 2401(b), the complaint was filed upon which this action is based. (Tr. 60.) This cause was tried on the second amended complaint (Tr. 4), which alleged that an employee covered by the Workmen's Compensation Act of the State of Washington was injured when an Army fire truck, driven by a duly authorized agent of the U. S. Army in the course of his employment, negligently entered an arterial highway at 25 miles per hour and struck the car being driven by the employee; that the employee, pursuant to Washington statute, elected to take the benefits of the Workmen's Compensation Act and assigned to the State of Washington his cause of action against the United States of America; and that the State of Washing-

ton, Department of Labor and Industries was required to expend $3,671.56 as a result of the injuries received by the employee, and prayed for judgment against the defendant in that amount.

The answer and cross-complaint of defendant, United States of America, filed December 15, 1950, set up defenses and alleges, among other things, that the proximate cause of the accident was the negligence of the state employee, and that the defendant was damaged in the amount of $60.76 thereby. (Tr. 10.)

Plaintiffs' reply (Tr. 18) denied the allegations of the answer, and the case was set down for trial on December 18, 1950. On that date the case was tried before the court, sitting without a jury. (Tr. 49.)

At the opening of the trial the court first considered the defenses that the complaint was not timely filed; that a complaint setting out the same cause of action had been dismissed on January 17, 1949, and that pursuant to Rule 41(b) of Federal Rules of Civil Procedure such dismissal operated as an adjudication upon the merits and the matters alleged in the complaint had become *res adjudicata*. (Tr. 49.)

The court ruled against the defendant on these defenses (Tr. 59, 60) and evidence was received and testimony taken. The evidence and testimony showed that on March 9, 1945, the date of the accident here involved, there was some sort of an agreement between the fire department of the city of Vancouver, Washington, and the Army authorities at Vancouver Barracks whereby, when the fire-fighting equipment of the one was called out in answer to a fire alarm the other would send a fire truck to the fire station of the first to stand by in case of

a second fire alarm; that upon that date, at approximately 4:00 o'clock p. m., the city fire department requested a standby fire truck from the Army authorities, and in response to this request an Army fire truck was dispatched to the Vancouver city fire station. This fire truck, with its siren sounding and red light flashing proceeded at 30 miles per hour along the usual route to the city fire station. The usual route was westward along 10th Street which crossed Washington Street, an arterial. The fire truck did not stop before entering the arterial (it slowed from 30 to 25 miles per hour), but entered the intersection at 25 miles per hour. At approximently the center of this intersection, which is in the congested business section of the city, the fire truck struck a Washington highway patrol vehicle on the left rear side, knocking the patrol car 20 feet and throwing the driver out and seriously injuring him. The jolt of the impact stopped the fire truck but it immediately set off on its journey without even stopping to render aid as required by state law. (Rem. Rev. Stat., § 6360-134.) It proceeded two and one-half blocks further to the city fire station, where it was parked. The highway patrol car was being driven by Eldon Parke, a state patrolman acting in the course of his employment. He was driving in a southerly direction on Washington Street at 20 miles per hour on his way to the patrol headquarters at the time of the accident. He was covered by the provisions of the Workmen's Compensation Act of the State of Washington and elected to take the benefits of the Act. The Department of Labor and Industries of the State of Washington was required to expend $3,671.56 as a result of this injury to its employee who assigned his cause of

action against the United States of America to the State of Washington.

At the conclusion of the testimony and argument of plaintiffs' counsel the court made its oral decision, finding against the plaintiffs, based upon *Puget Sound Electric Ry., et al., v. Benson*, 253 Fed. 710 (1918). (Tr. 123.) On January 4, 1951, the findings of fact and conclusions of law were filed (Tr. 21), and pursuant thereto judgment was entered January 9, 1951, denying the plaintiffs the relief prayed for in their complaint and dismissing their action, and also denying the defendant the relief prayed for in its cross-complaint and dismissing its cross-complaint and taxing costs against the plaintiff. (Tr. 27.)

Thereafter, plaintiffs duly perfected their appeal from this judgment (Tr. 30, 31), which presents to this court the question whether the Army fire truck was, at the time of the accident here involved, answering an emergency call within the purview of Washington law, and if so, was it operated with due regard for the safety of all persons using the public highway.

SPECIFICATION OF ERRORS

1. The court erred in making the following finding of fact:

> " * * * Under the facts as they existed and were so recognized by the Army and the City of Vancouver, it is clear that this trip was in fact an emergency trip, and that the government fire truck had the right of way enroute to the city fire station. * * *" (Tr. 25.)

Said finding was in error for the following reasons:

A. The transcript does not contain so much as one word of evidence tending to show that the City of Vancouver recognized the fact that the trip of the Army fire truck to the city fire station to act as a standby vehicle was an emergency trip.

B. The applicable Washington statute (Rem. Rev. Stat., § 6360-5) extends immunity from the rules of the road to a fire truck, only when said fire truck is "actually responding to an emergency call * * * within the purpose for which such emergency vehicle has been authorized * * *," and this fire truck was not privileged to run through an arterial stop (Tr. 103) for it was proceeding, not in response to a fire alarm, but to the Vancouver city fire station to act as a standby vehicle. (Tr. 107.)

2. The court erred in making the following finding of fact:

> " * * * the proximate cause of the accident was the failure of the driver of the state patrol car to yield the right of way to the defendant's fire truck, * * *." (Tr. 25.)

Said finding was in error for the reason that the state patrol car was traveling on an arterial street (Tr. 73) and was entitled to the right of way over the defendant's

fire truck for the same reasons as stated in "B" above with respect to the finding of fact quoted in Specification No. 1.

3. The court erred in making the following conclusion of law:

> "That the plaintiffs are not entitled to recover judgment on their action, * * * and the plaintiffs' action, * * * should therefore * * * be denied and dismissed, and that the defendant is entitled to judgment for costs * * *." (Tr. 26.)

The foregoing conclusion of law is in error for the following reasons:

A. The proximate cause of the accident was the failure of the Army fire truck to yield the right of way to the patrol vehicle, for the fire truck was not privileged to disregard the rules of the road for the same reasons as stated above in "1B" with respect to the finding of fact quoted in Specification No. 1.

B. If the Army fire truck was responding to an emergency call within the purview of the Washington statute (Rem. Rev. Stat., § 6360-5) it was not operated "with due regard for the safety of all persons using the public highway," and was driven in complete disregard of the rights of the patrol vehicle.

C. The defendant was not entitled to judgment for costs for the reasons stated in the two preceding paragraphs.

4. The court erred in entering judgment denying plaintiffs the relief prayed for and dismissing said action, and in awarding costs to defendant. (Tr. 27, 28, 29.)

The entry of said judgment was in error for the same reasons as stated above with respect to the conclusion of law quoted in Specification No. 3.

SUMMARY OF ARGUMENT

I. The Fire Truck Was Not Actually Responding to an Emergency Call Within the Purview of the Washington Statute, and It was Not Entitled to Immunity from the Rules of the Road Afforded By the Statute.

A. The liability of the defendant is to be determined by the law of the State of Washington.

B. The State of Washington is entitled to maintain this suit.

C. Emergency vehicles are immune from the rules of the road by Washington Statute (Rem. Rev. Stat., § 6360-5) *only* while actually responding to an emergency call. This fire truck was not responding to an emergency call, and its violation of the rules of the road was the proximate cause of the accident, making the defendant liable for the damages resulting from the collision.

II. If This Fire Truck Was, at the Time of This Accident, Actually Responding to an Emergency Call, Then It Was Not Operated With Due Regard for the Safety of the Highway Patrolman as Required by Statute.

A. The highway patrolman was not afforded a reasonable opportunity to stop or otherwise yield the right of way to the fire truck, and the defendant is liable for the damages resulting from the collision.

ARGUMENT

I. The Fire Truck Was Not Actually Responding to an Emergency Call Within the Purview of the Washington Statute, and It Was Not Entitled to Immunity From the Rules of the Road Afforded by the Statute.

A. The accident from which this litigation arises occurred in Vancouver, Clark County, Washington (Tr. 74) and the question of liability of the defendant, United States of America, must be determined by the laws of the State of Washington. (28 U.S.C. § 1346(b)).

B. The State of Washington is entitled to maintain this action as assignee of Eldon Parke of his cause of action against the United States of America as provided by Rem. Rev. Stat., § 7675:

> "* * * if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; * * *. Any such cause of action assigned to the state may be prosecuted or compromised by the department, in its discretion. * * *"

C. The questions presented to the court by this appeal are questions of construction of Rem. Rev. Stat., § 6360-5, which provides:

> "The provisions of this act shall be applicable to the operation of any and all vehicles upon the public highways of this state except that they shall not apply in the following cases:
>
> "(a) To any authorized emergency vehicle properly equipped as required by law and actually responding to an emergency call or in immediate

pursuit of an actual or suspected violator of the law, within the purpose for which such emergency vehicle has been authorized: *Provided*, That the provisions of this section shall not relieve the operator of an authorized emergency vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others: *Provided, further*, The provisions of this section shall in no event extend any special privilege or immunity in operation of an authorized emergency vehicle for any purpose other than that for which the same has been authorized;

"(b) To any persons, teams, vehicle or other equipment while actually engaged in authorized work upon the surface of a public highway in so far as suspension of the provisions of this act are reasonably necessary for the carrying on of such work: *And providing*, Reasonable precautions are taken to apprise and protect the users of such public highway, but such provisions shall apply to such persons, teams, vehicles and other equipment when traveling to and from such work;

"(c) To any persons, vehicles or otherwise, in so far as the same may be specifically exempted from any provision or provisions of this act."

Under the common law any municipal corporation which owns and operates a fire truck is not liable for damage negligently inflicted by such fire truck, for the operation of a fire truck is held to be a governmental function, and municipal corporations enjoy the immunity of the sovereign. 60 C.J.S. Motor Vehicles, § 372; *Rollow v. Ogden City*, 66 Utah 475, 243 Pac. 791; *Bradley v. City of Oskaloosa*, 193 Iowa 1072, 188 N. W. 896; *Gillespie v. City of Lincoln*, 35 Neb. 34, 52 N. W. 811.

As early as 1913 the legislature of the State of Nebraska modified this common law rule applicable to the operation of fire fighting equipment. The reason for this

modification is well stated in *Opocensky v. City of South Omaha*, 101 Neb. 336, 163 N. W. 325 at page 327:

> "Conditions have greatly changed in the use of the streets of cities in Nebraska since the decision of Gillespie v. City of Lincoln, supra, in 1892, particularly in the use of automobiles and other dangerous motor vehicles, and the Legislature has modified the law announced in that case as found in section 3049, Rev. St. 1913:
>
> "' * * * Provided, the speed limits in this section shall not apply to physicians, or surgeons, or police, or fire vehicles, or ambulances when answering emergency calls demanding excessive speed.'
>
> "The driver of this automobile was not 'answering calls demanding excessive speed.' He was therefore violating the law. He was not performing any service enjoined upon him by the state, but was acting under the authority of the city testing an article of the city property. Under modern conditions, such conduct is dangerous and, as it is wholly unnecessary, is forbidden by express statute."

In deciding this cause the lower court felt bound by the case of *Puget Sound Electric Ry. et al. v. Benson, supra*, which was decided by the U. S. Circuit Court of Appeals, Ninth Circuit, on October 28, 1918. (Tr. 127, 128, 129, 130.) In that case the plaintiff was injured in a collision with defendant's electric street car at a street intersection. He was at the time driving fire fighting apparatus belonging to the City of Seattle, and was returning from, and not going to, a fire. The case involved the construction of an ordinance of the City of Seattle which provided:

> " 'The following vehicles in the order named, shall have the right of way in the use of all streets and public places, viz., apparatus of the fire department, police patrol wagons, ambulances, responding to emergency calls, emergency repair wagons of the street railway companies, and U. S. mail wagons.' "

In the course of the opinion, it was there said:

> "The question involved is one of construction. It is insisted that the words 'responding to emergency calls' qualify the phrase 'apparatus of the fire department,' as well as 'ambulances,' and therefore that it is only when the apparatus of the fire department is responding to an emergency call that it is accorded the right of way under the ordinance.
>
> "The application of one of the simplest canons of statutory construction, namely, that 'a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction' * * *, would seem to be decisive of the question. The last antecedent is 'ambulances,' and under this rule the qualifying clause refers thereto, and not to the antecedents preceding that * * *."

It will be noted that, under that ordinance, fire trucks were given *carte blanche* right of way over all other users of the highway and it is submitted that this case is not in point as the questions here involved are of the construction of Rem. Rev. Stat., § 6360-5.

The Army fire truck, at the time of the accident here involved, was proceeding from the Army barracks to the Vancouver city fire station in order that it would be present, and could answer a fire alarm were one to be reported at the city fire station. (Tr. 107.) Its trip for this purpose puts it in the same category as though it were returning to the fire station after having answered a fire alarm.

A search fails to reveal any Washington cases interpreting Rem. Rev. Stat., § 6360-5, the pertinent statute here involved, and it therefore becomes necessary to resort to cases from other jurisdictions which interpret like or similar statutes.

In *Audette v. New England Transp. Co.*, 71 R. I. 420, 46 A. (2d) 570, the plaintiff was the driver of a fire truck

of the city of Pawtucket, and while returning to the fire station after answering a fire alarm, he was injured when the fire truck was in collision with defendant's bus at a street intersection. In the course of the opinion it was there said:

> "The second above-mentioned matter, which was injected into this case as a result of defendant's strong reliance on plaintiff's failure to heed the stop sign, is plaintiff's contention that under G. L. 1938, chap. 88, § 10, the bus was under the duty to stop 'upon the approach of any fire apparatus which is *going* to a fire or responding to an alarm.' (Italics ours.) Plaintiff argues that a truck which is *returning* from a fire or from responding to an alarm is entitled to the benefit of this statute. This contention is without merit. The obvious answer thereto is that if such was the intent and purpose of the statute it would have been easy for the legislature to have so indicated in plain and clear language."

In *Schumacher v. City of Milwaukee*, 209 Wis. 43, 243 N. W. 756, the plaintiff was injured when the car in which he was a passenger, was struck at a street intersection by a fire truck of the defendant city. At the time of the accident the fire truck was returning to the fire station after answering an alarm, and it passed through a red light at the intersection. In the course of the opinion in that case it was said:

> "It is next urged that the court erred in excluding evidence which was offered to show the meaning of the term 'answering a fire alarm' as that term is used in section 85.16(3), 1927 stats., which exempts police officers and others from speed limitations and highway traffic regulations in certain cases. Among other things, it is provided that 'all members of fire departments shall likewise be exempt while going to a fire or answering a fire alarm.' In this case the truck had been driven to the point indicated by the alarm; the fire was of no consequence. The defendant sought to show that, according to the regula-

tions of the fire department, answering a fire alarm included taking the equipment out and all things done in response to the alarm until the equipment was returned to its place. If such a regulation exists in the Milwaukee fire department, it would hardly control courts in the determination of the legislative purpose in the enactment of the section referred to. If the intent and purpose of the Legislature was to provide that all members of fire departments were exempt while upon the public streets in the operation of fire equipment, it would have been very easy for the Legislature to have so indicated. They said they should be exempt while going to a fire and so as to complete the exemption in cases where the alarm was turned in when there was no fire, when answering a fire alarm was included, putting the two things upon an equal footing. We can discover no legislative purpose to exempt members of fire departments from the operation of the statute except when they are going to a fire or going to a place in response to a fire alarm."

In *Lucas v. City of Los Angeles*, 10 Cal. 2d 476, 75 P. (2d) 599, the plaintiff was a passenger in an automobile which entered an intersection in response to a mechanical "Go" sign. In the middle of the intersection a police automobile of defendant municipal corporation, operated upon authorized emergency business, traveling at a high rate of speed and disregarding the traffic "Stop" signal, crashed into it, and plaintiff was injured. The plaintiff conceded that the defendant's automobile was responding to an emergency call, and that it was privileged to disregard the rules of the road, but contended that the defendant was guilty of an "arbitrary exercise of the privileges" in violation of statute. The court, in discussing this phase of the case in 75 P. (2d) 599, said at page 603:

"The expression 'arbitrary exercise of the privileges' has also caused some confusion. Since the

vehicles are excluded from the restrictions of speed and right of way, negligence cannot be predicated on those elements if proper warning has been given. These are among the 'privileges' which are granted by the statutes. An arbitrary exercise of them may rest upon the question whether an emergency in fact existed. The statute has determined this question in part by the limitation in section 120 to cases where the emergency vehicle is engaged in the chase of violators of the law or in response to a fire alarm. Members of the fire and police departments are relieved from civil liability when 'responding to an alarm of fire or an emergency police call.' Thus, if such a vehicle is being operated in response to a fire alarm, excessive speed alone is not an arbitrary exercise of these privileges. If these privileges were exercised in returning from a fire, or for some private purpose of the operator, it might be a case of an arbitrary exercise of them. Such is the effect of the rulings in *Hopping v. Redwood City*, 14 Cal. App. 2d 360, 58 P. 2d 379, and *Von Arx v. Burlingame,* 16 Cal. App. 2d 29, 60 P. 2d 305, where the facts disclosed that the public vehicles were not being operated in response to emergency calls at the time the injuries were inflicted. In David's 'Municipal Liability for Tortious Acts and Omissions,' page 141, the author advances the view that 'the practical purpose of this phrase was to cover the cases in which the authorized emergency vehicle is not enroute to the bedside of the sick man, the scene of the crime or the location of the fire; but where the drivers, by virtue of the character of the vehicle and by use of its siren, maintain non-necessary speeds and drive with abandon of the usual rules of the road, when there is no need. This is the case where the fire engine is returning from the fire, in the absence of any new call or emergency; where the engine of the motor vehicle is being warmed up or tested; when the policeman is making routine runs with no criminal in sight or immediate contemplation.' * * * "

The Washington statute requires that authorized emergency vehicles, to be entitled to immunity from the

rules of the road, must be "*actually* responding to an emergency call within the purpose for which such emergency vehicle has been authorized." (Italics supplied.) The "purpose" for which fire trucks are authorized is the preservation of life and property, and when answering emergency calls within this "purpose" public policy dictates that fire trucks should reach the scene of the emergency with all reasonable haste. But to permit a fire truck, with its extreme weight, and terrific capacity to cause harm, to speed through the busy streets of a modern city with their attendant congestion of automobiles and pedestrians, in complete disregard of the rules of the road, when such action is not necessary for the preservation of life or property, is repugnant to public policy and the laws of our modern civilization. This is the type of action the Washington Legislature, in enacting Rem. Rev. Stat., § 6360-5, sought to prevent.

This fire truck was not actually responding to an emergency call within the purpose for which it was designated and it was subject to the same laws as any other vehicle upon the highway. A vehicle approaching an intersection is required to give the right of way to vehicles on their right as provided in Rem. Rev. Stat., § 6360-88:

> "It shall be the duty of every operator of any vehicle on approaching public highway intersections to look out for and give right of way to vehicles on their right, simultaneously approaching a given point within the intersection, and whether such vehicle first enter and reach the intersection or not: *Provided*, This section shall not apply to operators on arterial public highways."

Rem. Rev. Stat., § 6360-90 provides:

> "The operator of any vehicle shall stop as required by law at the entrance to any intersection

with any arterial public highway, and having stopped shall look out for and give right of way to any vehicles upon such arterial highway simultaneously approaching a given point within the intersection, whether or not such vehicle first reach and enter the intersection."

These laws are applicable within incorporated municipalities as well as without municipalities as provided by Rem. Rev. Stat., § 6360-2:

> "The provisions of this act relating to vehicles shall be applicable and uniform throughout this state and in all incorporated cities and towns and all political subdivisions therein and no local authority shall enact or enforce any law, ordinance, rule or regulation in conflict with the provisions of this act except and unless expressly authorized by law to do so and any laws, ordinances, rules or regulations in conflict with the provisions of this act are hereby declared to be invalid and of no effect. Local authorities may, however, adopt additional vehicle and traffic regulations which are not in conflict with the provisions of this act."

All vehicles are required to stop before entering an arterial highway as provided by Rem. Rev. Stat., § 6360-105:

> "All primary state highways are hereby declared to be arterial highways as respects all other public highways or private ways. Those city streets designated by the director of highways as forming a part of the routes of primary state highways through incorporated cities and towns are hereby declared to be arterial highways as respects all other city streets or private ways. The operator of any vehicle entering upon any arterial highway from any other public highway or private way shall come to a complete stop before entering such arterial highway when stop signs are erected as provided by law."

All vehicles involved in an accident in which any person is injured, are required to stop and render aid as

required by Rem. Rev. Stat., § 6360-134, which provides, in part:

> "(a) An operator of any vehicle involved in an accident resulting in the injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident * * *."

Washington Street, in the City of Vancouver, Washington, was, at the time of this accident, designated by the Director of Highways as a primary state highway and an arterial highway (plaintiff's exhibit 2), pursuant to Rem. Rev. Stat., § 6450-61 (1943 Supp.), as follows:

> "The Director of Highways shall determine what city streets, if any, in any such incorporated cities and towns shall form a part of the route of any primary or secondary state highway through such incorporated cities and towns, and, between the first and fifteenth days of April of each year, shall certify by brief description, in duplicate, one copy to the State Auditor and one copy to the clerk of each incorporated city and town, which streets, if any, in such city or town are designated as forming a part of the route of a primary or secondary state highway through such city or town."

II. If This Fire Truck Was, at the Time of This Accident, Actually Responding to an Emergency Call, Then It Was Not Operated With Due Regard for the Safety of the Highway Patrolman.

If the court finds that this fire truck was, at the time of this accident, actually responding to an emergency call, and the appellants earnestly contend that it was not, then this fire truck was not operated with due regard for the safety of Eldon Parke, the state highway patrolman.

Rem. Rev. Stat., § 6360-5 provides in part that:

> "* * * the provisions of this section shall not relieve the operator of an authorized emergency

> vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others: * * * "

The reported cases make a broad distinction between the acts which will be held to violate the "duty to operate with due regard for the safety of all persons using the public highway" and those acts which will be held to be "a reckless disregard for the safety of others." The case of *Raynor v. City of Arcata*, Cal. Sup., 77 P. (2d) 1054 at page 1057 sets out this distinction very clearly. It is said:

> "The provisions in sections 120 and 132, supra, to the effect that the exemptions there given shall not relieve the driver of an emergency vehicle of the duty to drive with due regard to the safety of the public, means that the driver must, 'by suitable warning, give others a reasonable opportunity to yield the right of way.' Lucas v. City of Los Angeles, Cal. Sup., 75 P. 2d 599, 603. The sections also provide that the exemption shall not protect the driver from 'an arbitrary exercise' of the privileges there granted. But an arbitrary exercise of said privileges cannot be predicated upon the elements of speed and failure to observe other rules of the road where a warning has been given. 'In such cases speed, right of way, and all other "rules of the road" are out of the picture.' 75 P. 2d 599, 605."

In the instant case Eldon Parke was traveling south along Washington Street, an arterial street, and there was a "Stop" sign facing traffic approaching this street from the east along 10th Street as was this fire truck. (Tr. 81.) Eldon Parke was very familiar with this intersection, and with the fact that traffic seeking to enter Washington Street from 10th Street was required by law to stop. (Tr. 73.) Parke had entered the intersection before he heard a siren (Tr. 75) and it was a matter of only

a few seconds from the time he heard the siren until his car was struck in the left rear portion by the fire truck. (Tr. 81, 83.) The Army fire truck did not stop at the "Stop" sign, but entered the arterial street, Washington Street, at 25 miles per hour. (Tr. 108.) At the time this fire truck started on this trip the driver was not under the apprehension that he was answering an alarm of fire, but knew that he was to go to the city fire station to act as a standby vehicle. (Tr. 107.) When the fire truck reached the city fire station it was parked inside the station. (Tr. 108.)

The statutory provision requiring emergency vehicles, while answering emergency calls, to operate with "due regard to the safety of the public" was before the court in the case of *Balhasar v. Pacific Electric Ry. Co.*, 187 Cal. 302, 202 Pac. 37, and in considering this provision of the statute the court said:

> "It is evident that the right of way of fire apparatus over other vehicles is dependent upon 'due regard to the safety of the public' only in so far as such 'due regard' affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus. * * *"

In *Muhs v. Fire Ins. Salvage Corps of Brooklyn*, 85 N. Y. Supp. 911, the plaintiff, a pedestrian, was run over by a fire engine which was responding to a fire alarm. In upholding a verdict for the plaintiff, the court said at page 912:

> "The defendant is not absolved from liability for negligence merely because, by the terms of the act incorporating it (section 2, c. 1016, p. 2064, Laws 1895), it is given 'the right of way in the streets of

Brooklyn.' Such right of way is necessarily subject to the preservation of the safety of those who may be lawfully upon the streets at the time of a fire, and, while the emergency under which the defendant's servants are called upon to act undoubtedly justifies speed in driving to the scene of disaster, such speed must be exerted with reasonable care and a due regard to the lives and limbs of those who may be met upon the way. In the eagerness to save property, the value of human life is sometimes lost sight of. * * *"

In *City of Lansing v. Hathaway*, 280 Mich. 87, 273 N. W. 403, a fire truck of the plaintiff city, while answering a fire alarm, ran a red stop light at an intersection and, while crossing the intersection, was struck by defendant's automobile which entered the intersection under protection of the green light. The city brought the suit to recover the expense of repair to the truck and the cure of the injured fireman. In the course of the opinion it was there said:

"The fire truck and the automobile entered the intersection at the same time. We assume, for the purposes of decision, that, under the city ordinance, the fire truck, as an emergency vehicle responding to a fire alarm, had a right to run the red light upon giving 'audible signal' and having reasonable regard for the safety of others. Defendant had a right, under permission of the green light, to cross the intersection unless, by the reasonable exercise of the senses of sight and hearing, he should have noticed or heard warning to the contrary.

"The evidence in the case fully justified the following finding and conclusion of law by the circuit judge: 'The issue of fact is rather close but I am brought to the conclusion that it cannot be affirmatively said that the defendant was guilty of negligence in the operation of his car. Rather I think that he did what the ordinary operator of a vehicle would have done in approaching this intersection. He was making observations through his windshield. He

saw the automobiles at the intersection. He observed that the traffic light was with him, and there was no obstacle in his immediate pathway. His vision of the approaching truck as he entered the intersection was cut off by other cars. To say that he was guilty of negligence in proceeding necessarily implies that due care required him to come to a stop, an operation that might have been attended with some danger. In any event, it can scarcely be claimed that the ordinary driver of an automobile would have stopped, or have acted in any other manner than did the defendant. As I view the situation, the accident, and resultant injury to the property of the plaintiff, should be regarded as having occurred without actionable fault.' "

In *Ferraro v. Earle et al.*, 105 Vt. 243, 164 Atl. 886, the plaintiff was a passenger in an automobile which was struck at an intersection by a fire truck driven by the defendant. At the time of the accident the fire truck was responding to a fire alarm, and entered the intersection with the red light against it. In the course of the opinion it is said:

"While the fire truck was favored with the statutory right of way and the act of driving it through the intersection against a red light did not, of itself, constitute negligence as a matter of law, it does not follow that Earle was privileged to proceed in disregard of the rights of others. Jasmin v. Parker, 102 Vt. 405, 416, 148 A. 874, and cases cited. The right must be exercised in a reasonable manner in view of the circumstances. It remains to consider whether the evidence made the question of Earle's negligence an issue for the jury. His conduct must be judged by the situation and conditions confronting him. He was confronted with the duty of the due performance of his public service, and the apparent exigency of the occasion which called for haste to bring the services of men and equipment to the place where property or lives, or both, might be exposed to the hazards of fire; he was approaching an intersection with the right of way for him, but with a red

light against him. The red light was a warning to him that traffic on West street might be proceeding into the intersection without knowledge of the approach of the fire truck and in reliance upon the protective invitation of the green light. The mandate of the statute (subdivision 3, § 68, No. 70, Acts 1925), applicable to the operator of a vehicle of any kind, is that 'all intersecting highways shall be approached and entered slowly and with due care to avoid accident.' 'Due care' is care commensurate with the circumstances calling for its exercise. The precautions to be taken increase with the hazards. The situation confronting the defendant Earle required him to be very alert and watchful to avoid injury to others; that is, he was bound to exercise the care of a prudent person, who was driving a fire truck to a fire at the place and under the circumstances here disclosed. * * *"

In the instant case Eldon Parke had a right to cross the intersection on this arterial street unless, by the reasonable exercise of his senses of sight and hearing, he should have noticed or heard warning to the contrary. The court found that he neither heard the siren nor saw the red flashing light of the fire truck. (Tr. 126.) The driver of the fire truck did not see the automobile driven by Eldon Parke, but that was only because he failed to look. (Tr. 108.) The fire truck drove through the "Stop" sign at 25 miles per hour (Tr. 108) and Eldon Parke did not have a reasonable opportunity to stop or otherwise yield the right of way. The defendant having failed to give Eldon Parke a reasonable opportunity to yield the right of way, is liable for the damage resulting from the collision.

CONCLUSION

It is conceded that no case is here cited which is ex
actly on all fours with the questions here involved. How
ever, a consideration of the Washington statute, in th
light of the cases cited, and the changes that have bee
wrought in our society during the past forty years, force
one to the conclusion that the Legislature, in enactin
the statute here under consideration, sought to foresta
such action as the fire truck here involved was guilty
and failing to forestall such action, it was the legislativ
purpose to hold the owners liable for any mischief cre
ated.

Respectfully submitted,

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